137

No. 09-67

Supreme Court, U.S.
FILED
AUG 14 2009
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

RYAN WHITESIDE,

Petitioner,

v.

RUSSELLVILLE NEWSPAPERS, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

BRIEF IN OPPOSITION

JOHN E. TULL III
E. B. CHILES IV*
KRISTINE G. BAKER
QUATTLEBAUM, GROOMS,
TULL & BURROW PLLC
111 Center Street, Suite 1900
Little Rock, Arkansas 72201
(501) 379-1700

* *Counsel of Record* *Attorneys for Respondents*

224522

CP

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

STATEMENT PURSUANT TO RULE 29.6

Respondent Russellville Newspapers, Inc. is wholly owned by respondent Paxton Media Group, LLC. Paxton Media Group, LLC has no parent corporation, and no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

	Page
STATEMENT PURSUANT TO RULE 29.6 ..	i
TABLE OF CONTENTS	ii
TABLE OF CITED AUTHORITIES	iv
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE PETITION	7
A. The Petition Raises No Important Issue of Federal Law	7
B. The Petition Demonstrates No Conflict With a Decision of This Court, a Federal Court of Appeals, or Another State Court of Last Resort	9
1. The Petition Demonstrates No Conflict on the Requirement of Official Action	9
2. The Petition Demonstrates No Conflict on the Relevance of "Malice"	12
C. The Petition Seeks Review of the Application of Correctly Stated Rules of Law to the Facts of the Case	13

Contents

Page

1. The Supreme Court of Arkansas Correctly Stated the Rule of Arkansas Law Governing Official Action 13

2. The Supreme Court of Arkansas Correctly Stated the Rule of Arkansas Law Regarding the Substantial-Truth Doctrine 16

CONCLUSION 21

TABLE OF CITED AUTHORITIES

Page

Cases:

Bankers Life & Cas. Co. v. Crenshaw,
486 U.S. 71 (1988) 9

Brandon v. Gazette Publ'g Co.,
352 S.W.2d 92 (1961) 8

Butler v. Hearst-Argyle Television, Inc.,
49 S.W.3d 116 (Ark. 2001) 8, 20

Faulkner v. Arkansas Children's Hosp.,
69 S.W.3d 393 (Ark. 2002) 18

Jones v. Commercial Printing Co.,
463 S.W.2d 92 (Ark. 1971) 8, 20

KARK-TV v. Simon,
656 S.W.2d 702 (Ark. 1983) 8

Kenney v. Scripps Howard Broad. Co.,
259 F.3d 922 (8th Cir. 2001) 10

Lewis v. NewsChannel 5 Network L.P.,
2005 WL 3237681 (Tenn. Cir. Ct. Jan. 10, 2005)
..... 12

Newell v. Field Enterprises, Inc.,
415 N.E.2d 434 (Ill. Ct. App. 1980) 12

Cited Authorities

	Page
Phillips v. Evening Star Newspaper Company, 424 A.2d 78 (D.C. 1980)	10-11
Porter v. Guam Publ'n, Inc., 643 F.2d 615 (9th Cir. 1981)	10
Reilly v. Associated Press, 797 N.E.2d 1204 (Mass. Ct. App. 2003)	11
Salzano v. North Jersey Media Group, 958 A.2d 1023 (N.J. Super. A.D. 2008)	12
Solaia Technology, LLC v. Specialty Publ'g Co., 852 N.E.2d 825 (Ill. 2006)	12
Stokes v. CBS, Inc., 25 F. Supp. 2d 992 (D. Minn. 1998)	12
Thomas v. Tel. Publ'g Co., 929 A.2d 993 (N.H. 2007)	10
TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443 (1993)	9
Wynn v. Smith, 16 P.3d 424 (Nev. 2001)	10
Yohe v. Nugent, 321 F.3d 35 (1st Cir. 2003)	10

Cited Authorities

Page

United States Constitution:

First Amendment 7, 8

Rules:

S. Ct. R. 10 13

Other:

Restatement (Second) of Torts § 611 (1977) 5, 6, 8, 13

STATEMENT OF THE CASE

Factual Background. In early January 2007, Neal Ronquist, the publisher of *The Courier*, a newspaper in Russellville, Arkansas, heard a radio report about an alleged rape on December 28, 2006. Ronquist asked *Courier* editor Scott Perkins whether the newspaper had published a story on the subject. Perkins and Ronquist discussed the issue again after Perkins received information that some of the persons involved had connections to the upcoming trial of Kevin Jones for the murder of Nona Dirksmeyer in December 2005. Dirksmeyer's murder and the State of Arkansas's charge of first-degree murder against Jones received so much attention that Jones eventually moved for a change of venue. Perkins intended to see whether a police report regarding the alleged events of December 28 existed.

The Courier had access to the AEGIS computer system of the Russellville Police Department through a dedicated Police Department terminal. The Police Department determined what documents to make available to *The Courier* through the AEGIS system. Perkins called Police Department employee Charles Falwell to inquire about a police report regarding the alleged rape on December 28. Perkins told Falwell that a *Courier* reporter had gone to the Police Department to get any available police report. Falwell indicated that the police report might not contain much information but told Perkins that *The Courier* could have the information available to *The Courier* in the AEGIS system.

Within the next 15 to 30 minutes, Perkins had reviewed information *The Courier* obtained from the AEGIS system regarding a Case Report by Officer Lee Goemmer dated December 31, 2006. *The Courier* obtained more information from the AEGIS system than Perkins had anticipated based on his conversation with Falwell, so Perkins called Falwell again and told Falwell that the information from the Case Report was more extensive than Falwell had suggested. Falwell did not tell Perkins that the Police Department should not have released extensive information from the Case Report, that the Police Department had imposed any restrictions on releasing information from the Case Report, or that *The Courier* should not run a story based on information from the Case Report. Falwell told Perkins that the Police Department had turned over the investigation to the Arkansas State Police and referred Perkins to David Gibbons, a local prosecuting attorney. Perkins then called Gibbons and told Gibbons that *The Courier* had obtained a report from the Police Department and was looking at publishing an article based on it.

Ronquist believed that *The Courier* should consider an article based on the information from Officer Goemmer's Case Report because the allegations in the Case Report involved Jones, who was charged with Dirksmeyer's murder, and Ryan Whiteside and Chelsea Huckabay, who were expected to testify at Jones's trial. The information from the Case Report revealed that it had been alleged that 19-year-old Jessica Roper was raped at a party at Whiteside's home in Russellville on December 28 and 29, 2006. Officer Goemmer based the Case Report on information obtained from Roper and her cousin, Christina Robison. While Robison did not

attend the party, Robison relayed to Officer Goemmer a conversation she claimed to have had with Huckabay, who did attend the party. Police Department records identified Jones, Whiteside, and Jeffery Simmons as suspects. Officer Goemmer's Case Report explained that Huckabay was not available for an interview at the time of the report. It also detailed Officer Goemmer's accompanying Roper to retrieve the clothing she wore the night of the party at Whiteside's home and to undergo a rape examination at a hospital. It described the chain of custody of the clothing and the materials from the rape examination. It explained that Officer Goemmer passed off the remainder of the investigation to a detective who responded to Officer Goemmer's call.

Perkins asked reporter Janie Ginocchio to look into writing about the State Police's investigation of the allegations Roper and Robison made to Officer Goemmer. Ginocchio wrote an article based on the information from the Case Report *The Courier* obtained from the Police Department and her interviews of Gibbons and Commander Bill Beach of the State Police. Through Gibbons and Beach, Ginocchio verified that the State Police were investigating the allegations Roper and Robison made. Ginocchio's article appeared in *The Courier* on January 11, 2007, under the headline "ASP looks into alleged rape." The subheadline read, "3 named in police report linked to Dirksmeyer murder trial."

On Saturday, January 13, 2007, Gibbons faxed to Ginocchio an Investigative Summary dated January 12, 2007, prepared by Arkansas State Police Special Agent Stacie Rhoads and Gibbons's letter to Rhoads of the

same date. Ginocchio learned at that time that Gibbons had decided not to prosecute any of the suspects and that Huckabay denied making the allegations that Robison reported to the Police Department. Gibbons told Ginocchio in a telephone conversation that he found insufficient evidence to prosecute but that Roper had not recanted her allegation of rape and that Gibbons did not intend to charge Roper with filing a false police report. Ginocchio wrote an article that appeared the following day in *The Courier* under the headline "No charges filed in alleged rape." The subheadline read, "Prosecutor cites lack of evidence; those mentioned have links to Jones trial."

After the publication of the second article, Perkins met with Dennis Whiteside, Ryan Whiteside's father. Dennis Whiteside showed Gibbons's January 12 letter to Perkins and asked Perkins why the second article did not contain a statement from the letter that "there is no evidence at all Ryan Whiteside or Kevin Jones . . . had any sexual contact with the complainant . . . ." *The Courier* then published a "Clarification" that included that statement.

Procedural History. Less than a month after the publication of the "Clarification," petitioner Ryan Whiteside filed suit in the Circuit Court of Pope County, Arkansas, against respondents Paxton Media Group, LLC, its wholly owned subsidiary Russellville Newspapers, Inc., Ronquist, Perkins and Ginocchio (collectively, "Paxton Media") and claimed that the articles published in *The Courier* defamed him. Following extensive discovery, Paxton Media moved for summary judgment on three independent bases. For one of its

grounds, Paxton Media argued that the fair-report privilege protects Paxton Media from liability based on the articles at issue because the allegedly defamatory statements reflected a fair abridgement of the contents of official government documents. As articulated in the Restatement (Second) of Torts and adopted in Arkansas, the fair-report privilege provides that "'[t]he publication of defamatory matter concerning another in a report of an official action or proceeding or of a meeting on a matter of public concern is privileged if the report is accurate and complete or a fair abridgment of the occurrence reported.'" App. 7-8 (quoting *Restatement (Second) of Torts* § 611 (1977)).

The Circuit Court granted summary judgment in Paxton Media's favor because the undisputed facts show that the fair-report privilege shields Paxton Media from liability. *Id.* at 19-22. In its summary-judgment decision, the Circuit Court observed that Whiteside based his defamation claim on two articles published in *The Courier* and that no one disputes the contents of those written publications. *Id.* at 20. The Circuit Court also noted that it is undisputed that Ginocchio based the first article on documents generated by the Russellville Police Department and that no one disputes the contents of those police-generated materials. *Id.* The Circuit Court found no dispute that Ginocchio based the second article on the same materials generated by the Police Department and the January 12, 2007, letter from Gibbons, whose contents no one disputes. *Id.* at 20-21. Given these undisputed facts, the Circuit Court held that no genuine issue of material fact exists with respect to the application of the fair-report privilege. *Id.* at 21.

Applying Arkansas law to these undisputed facts, the Circuit Court held that the documents on which Ginocchio relied in preparing the articles were official public documents that the Police Department and Gibbons voluntarily and legally released. *Id.* The Circuit Court also held that the articles gave a substantially fair report of the contents of the official public documents on which Ginocchio based the articles. *Id.* at 21-22. The Circuit Court therefore held that the fair-report privilege protects Paxton Media from liability and dismissed Whiteside's complaint with prejudice. *Id.* at 22.

Whiteside moved for a "new trial" and for "relief from the judgment." *Id.* at 24. The Circuit Court denied Whiteside's motion and clarified that it based its summary-judgment decision on consideration of all three articles cited in Whiteside's complaint; all other pleadings, exhibits, and affidavits of record; and the lawyers' arguments. *Id.*

The Supreme Court of Arkansas affirmed. The Supreme Court of Arkansas observed at the outset of its analysis that it had "previously recognized" the fair-report privilege. *Id.* at 7. It then quoted section 611 of the Restatement (Second) of Torts for a description of the privilege. Taking in turn each point on appeal raised by Whiteside, the Supreme Court of Arkansas held (1) that "there was an official action and the information released on the AEGIS system was covered by the fair-report privilege," *id.* at 10; (2) that there was "no merit in Whiteside's argument that the circuit court erred by finding that the report was voluntarily and legally released," *id.* at 11; and (3) that Paxton Media "fairly and accurately reported the information as released by the police on the AEGIS system." *Id.* at 18. The Supreme Court of Arkansas denied Whiteside's later petition for rehearing. *Id.* at 26.

REASONS FOR DENYING THE PETITION

This Court should deny the petition for a writ of certiorari for at least three good reasons. First, the petition raises no important issue of federal law; the decision of the Supreme Court of Arkansas turned on Arkansas common law regarding the fair-report privilege, not the First Amendment. Second, the petition fails to identify any decision of this Court, a federal court of appeals, or a state court of last resort that conflicts with the decision of the Supreme Court of Arkansas. Third, the petition constitutes no more than an argument about the application of uncontested principles of Arkansas law to the peculiar facts of this particular case. No basis for certiorari exists.

A. The Petition Raises No Important Issue of Federal Law

Whiteside unpersuasively attempts to generate a dispositive federal issue in his petition. He says that the case "presents the question whether the Fair Report Privilege under the First Amendment protects a media defendant from liability" under these facts. Pet. i. He also says that "it is important that this Court set a national minimum standard for the application of the Fair Report Privilege." *Id.* at 10. And he says that "the Arkansas Supreme Court . . . has expanded the Fair Report Privilege in such a way as to provide less protection to private individuals from irresponsible press action than would be provided in other states, thereby violating Petitioner's Fourteenth Amendment rights." *Id.* There is no important federal question here, however.

Affirming the summary judgment against Whiteside, the Supreme Court of Arkansas applied Arkansas common law on the fair-report privilege, not the First Amendment. The Supreme Court of Arkansas, in reliance on section 611 of the Restatement of Torts, has "recognized" that privilege as a matter of common law since 1961. *See* App. 7; *Butler v. Hearst-Argyle Television, Inc.*, 49 S.W.3d 116 (Ark. 2001); *KARK-TV v. Simon*, 656 S.W.2d 702 (Ark. 1983); *Jones v. Commercial Printing Co.*, 463 S.W.2d 92 (Ark. 1971); *Brandon v. Gazette Publ'g Co.*, 352 S.W.2d 92 (1961). While the Supreme Court of Arkansas cited federal constitutional principles once—and only once—in its decision, *see* App. 12, it reached its holdings chiefly in reliance on its own precedent and the Restatement, not decisions regarding federal constitutional law. Whiteside appears to recognize as much when he observes that the first issue he raises concerns "an area of unresolved law *in Arkansas*." Pet. 21 (emphasis added).

Whether the First Amendment even provides a constitutional fair-report privilege at all, moreover, is not a question presented by Whiteside's petition. The petition, instead, focuses on the application of the privilege, as recognized in Arkansas, to the facts of this case. Applying federal law to either of the questions actually presented by the petition would not alter the common law of Arkansas in regard to the fair-report privilege or command a different result in this case under Arkansas law. For these reasons, Whiteside fails to raise an important issue of law in regard to the First Amendment.

Whiteside never even presented his contention about his "Fourteenth Amendment rights" to the Arkansas courts. Thus, he did not preserve it for review by this Court. *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 464 (1993) (a point not "squarely argue[d]" in the state supreme court is waived); *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 77-78 (1988) (there should be no doubt that the substance and nature of the federal claims were raised below in the time and manner required by state law). In any event, he makes no argument on that point in his petition, which is indicative of the seriousness with which this Court should treat it. Whiteside's failure to raise any important issue of federal law warrants the summary denial of his petition.

B. The Petition Demonstrates No Conflict With a Decision of This Court, a Federal Court of Appeals, or Another State Court of Last Resort

In addition to failing to raise an important issue of federal law, Whiteside's petition incorrectly seeks certiorari on the ground that the decision of the Supreme Court of Arkansas conflicts with the decisions of courts in other jurisdictions. It does not.

1. The Petition Demonstrates No Conflict on the Requirement of Official Action

Whiteside first attacks the Supreme Court of Arkansas's holding that "there was an official action and the information released on the AEGIS system was covered by the fair-report privilege." App. 10. As the Supreme Court of Arkansas correctly observed,

however, various jurisdictions agree that, generally, information released by law-enforcement personnel, including reports and records, constitutes a report of an official action subject to the fair-report privilege. *Id.* at 9 (citing, *inter alia*, *Yohe v. Nugent*, 321 F.3d 35 (1st Cir. 2003) (statements made to press by police chief based on witness statements); *Kenney v. Scripps Howard Broad. Co.*, 259 F.3d 922 (8th Cir. 2001) (information obtained from missing-person report, pick-up order, and investigative report); *Porter v. Guam Publ'n, Inc.*, 643 F.2d 615 (9th Cir. 1981) (police investigation obtained from "daily police bulletin" of criminal complaints and arrest reports, even when based on false charges); *Thomas v. Tel. Publ'g Co.*, 929 A.2d 993 (N.H. 2007) (information obtained from pre-sentence investigation report)).

Whiteside cites no conflicting authority from this Court, a federal court of appeals, or another state court of last resort. In *Wynn v. Smith*, a case on which Whiteside relies, the Nevada Supreme Court held "that unauthorized or confidential investigatory reports do not qualify as an 'official action or proceeding' under the fair report privilege." 16 P.3d 424, 430 (Nev. 2001). That holding does not conflict with the holding of the Supreme Court of Arkansas. The Nevada Supreme Court, moreover, reached its decision after considering a Scotland Yard report that was not accessible to the public and that Scotland Yard itself never recognized as "official." *Id.* "The report was never sent to the British Gaming Control Board, which urged Scotland Yard to compile the report, and the report was archived for being substandard and unsubstantiated." *Id.* In *Phillips v. Evening Star Newspaper Company*, the District of

Columbia Court of Appeals declined to extend the common-law privilege to a "hot line log." 424 A.2d 78, 89 (D.C. 1980). The court observed that "the log represents little more than an informal arrangement between the police and the media, a joint venture, which consists of nothing more sanctified than unofficial statements of police regarding a crime." *Id.* These facts are not analogous to the instant case. Officer Goemmer not only filed a report based on the witness statements about which Whiteside complains but also conducted an initial investigation, which he recounted in his report, and the Arkansas State Police commenced an investigation. App. 10. Whiteside is wrong to argue that the cases he cites "conflict" with the decision of the Supreme Court of Arkansas.

The remaining cases cited by Whiteside on this point are not from this Court, federal courts of appeals, or state courts of last resort, and, in any event, they are inapposite, too. In *Reilly v. Associated Press*, 797 N.E.2d 1204 (Mass. Ct. App. 2003), the Massachusetts Court of Appeals held that the fair-report privilege did not protect a media defendant's publication of statements concerning a dog's missing veterinary records and harassing telephone calls made to a veterinary hospital's business manager. The court reached that conclusion because the article at issue did not report on any investigation or police action following the statements to police and therefore did not report on any official government action. In this case, in contrast, *The Courier* reported about an investigation and other actions taken by law-enforcement personnel following a complaint to police and the prosecuting attorney's decision not to press charges based on that

complaint. The Supreme Court of Arkansas thus correctly held that "there was an official action." App. 10. *Lewis v. NewsChannel 5 Network L.P.*, 2005 WL 3237681 (Tenn. Cir. Ct. Jan. 10, 2005), upon which Whiteside also relies, is an unpublished decision by a Tennessee trial court that Whiteside admits "applied to media reports of police arrests or stops, neither of which were involved in the instant case." Pet. 14.

2. The Petition Demonstrates No Conflict on the Relevance of "Malice"

Whiteside's second argument purportedly is that the Supreme Court of Arkansas's holding that malice is irrelevant to the application of the fair-report privilege conflicts with other jurisdictions. Whiteside cites four supposedly conflicting cases. Only one of them, *Solaia Technology, LLC v. Specialty Publ'g Co.*, 852 N.E.2d 825 (Ill. 2006), came from a state court of last resort. Two, *Salzano v. North Jersey Media Group*, 958 A.2d 1023 (N.J. Super. A.D. 2008), and *Newell v. Field Enterprises, Inc.*, 415 N.E.2d 434 (Ill. Ct. App. 1980), are from intermediate state appellate courts. The final, *Stokes v. CBS, Inc.*, 25 F. Supp. 2d 992 (D. Minn. 1998), is a decision from a federal district judge. In any event, Whiteside cites these cases for the unremarkable proposition that a publisher can lose the benefit of the fair-report privilege by failing to provide a fair abridgement of the relevant official action. Pet. 28. That proposition does not conflict with any holding of the Supreme Court of Arkansas and does not support certiorari here.

C. The Petition Seeks Review of the Application of Correctly Stated Rules of Law to the Facts of the Case

Whiteside does not really argue with any statement of law by the Supreme Court of Arkansas. His petition amounts to no more than arguments that the Supreme Court of Arkansas misapplied correctly stated rules of law to the peculiar facts of this particular case. Such a contention "rarely" results in a grant of certiorari. S. Ct. R. 10. It should not result in one here.

1. The Supreme Court of Arkansas Correctly Stated the Rule of Arkansas Law Governing Official Action

Whiteside first complains about the Supreme Court of Arkansas's holding that "there was an official action and the information released on the AEGIS system was covered by the fair-report privilege." App. 10. The relevant rule of law is that "'[t]he publication of defamatory matter concerning another in a report of an official action or proceeding or of a meeting on a matter of public concern is privileged if the report is accurate and complete or a fair abridgment of the occurrence reported.'" *Id.* at 7-8 (quoting *Restatement (Second) of Torts* § 611 (1977)). The Supreme Court of Arkansas noted that information released by law-enforcement personnel, including reports and records, generally constitutes a report of an official action subject to the fair-report privilege. *Id.* at 9. Whiteside does not argue with this correctly stated rule of law; he disputes the application of this rule of law to the facts of this case. He argues, "Whether the Russellville Police Department

voluntarily released the subject witness statements is a *material fact question* in determining whether the statements are 'public' documents and thus subject to the Fair Report Privilege." Pet. 12-13 (emphasis added). And he challenges the Circuit Court's conclusion, affirmed by the Supreme Court of Arkansas, that "there is no dispute that the police report . . . was voluntarily and legally released for public consumption when [the Russellville Police Department] released the report and statements therein to [Paxton Media]." Pet. 17-18 (first brackets in original). His argument is all about the facts, not the law.

In any event, the facts, properly considered, support the Supreme Court of Arkansas's application of the correctly stated law of Arkansas in this case and support the holding of the Supreme Court of Arkansas that the undisputed facts show official action. It is undisputed that Roper and Robison gave information to Officer Goemmer that implicated Whiteside and others in an alleged rape and that Officer Goemmer generated a report that recounted the information Roper and Robison gave to him. Officer Goemmer also detailed his responsive actions. He noted that he could not question Huckabay at the time of the report by Roper and Robison. He related that he followed Roper to an apartment to retrieve the clothing she wore the night of the alleged rape, learned that no one had washed the clothing since then, and instructed Roper on bagging the clothing. He revealed that he followed Roper to a specific hospital for a rape examination, identified the nurse who performed the rape examination, and detailed the chain of custody with respect to the clothing he and Roper retrieved and the material from the rape

examination the nurse performed. He also noted that he contacted a detective who responded to investigate further.

The way *The Courier* obtained the information from the Case Report and the reaction of the Police Department and the State Police to *The Courier's* having that information provide additional support for denominating the Case Report an official document. *The Courier* obtained the information from Officer Goemmer's Case Report from the AEGIS system at the Russellville Police Department, just as it routinely obtained other Police Department reports. When Perkins told Falwell that *The Courier* obtained a more extensive report than Falwell suggested the newspaper would access, Falwell never told Perkins that *The Courier* should not have received the document, never indicated that any restrictions on publication of the document existed, and never suggested that *The Courier* should not run an article based on the document. The Russellville Police Department had referred Roper's and Robison's allegations to the Arkansas State Police for investigation. Ginocchio confirmed the existence of that ongoing investigation before *The Courier* published anything about Whiteside by talking with both Gibbons and Beach. Neither of them told Ginocchio not to write a story based on Officer Goemmer's Case Report. The State Police's investigation resulted in Special Agent Rhoads's Investigative Summary and Gibbons's decision not to charge anyone with a crime, both of which *The Courier* also reported. Even if this Court accepted Whiteside's invitation to grant certiorari in a case that is more about the facts than the law, the undisputed facts support the decision of the Supreme Court of Arkansas.

2. The Supreme Court of Arkansas Correctly Stated the Rule of Arkansas Law Regarding the Substantial-Truth Doctrine

For his second point in support of certiorari, Whiteside claims, in essence, that the Supreme Court of Arkansas should have found a genuine issue of material fact as to whether Paxton Media abused the fair-report privilege. Whiteside does not quarrel, however, with the Supreme Court of Arkansas's statement of Arkansas's substantial-truth doctrine—that is, that the publisher must only report the "gist" or "sting" of the source documents to benefit from the privilege. *See* Pet. 22; App. 13-14. The detail with which Whiteside argues about the facts of the case demonstrates that his real argument is about applying Arkansas law to the facts, not about correctly stating the law.

Whiteside is, for what it is worth, totally wrong in his analysis of the facts. Whiteside complains about the fourth sentence in *The Courier's* first article about the investigation: "The Courier obtained police documents from the Russellville Police Department's AEGIS computer system detailing the victim's complaint." He says that this statement is not substantially correct because "the victim did not make a complaint of criminal conduct." Pet. 23. The facts, however, are entirely to the contrary. Officer Goemmer's Case Report identifies Roper as the victim and rape as the offense. It reveals that Roper informed Officer Goemmer that she went to a party and awoke the next morning at the same residence "sore down there" with no recollection of what happened to her the night before. Officer Goemmer

recounted that Roper "advised [him] that she had never had sexual intercourse with any of the three suspects prior to the rape." Officer Goemmer related that Roper came to the Police Department to provide this information with Robison, who divulged a graphic account of the rape of Roper that Huckabay purportedly shared with Robison. Officer Goemmer also related that he accompanied Roper to retrieve the clothes she wore the night of the party and to submit to a rape examination at a hospital. Roper testified at deposition that she reported to the police because Simmons raped her. Paxton Media, thus, was more than substantially accurate when it wrote, "The Courier obtained police documents from the Russellville Police Department's computer system detailing the victim's complaint."

Whiteside also criticizes the following sentences from the first article: "According to the police report, Huckabay checked on the victim a second time and saw Whiteside allegedly having sexual contact with the victim while Jones allegedly watched. After Huckabay asked if the men planned on 'just taking turns,' she was told to leave again, according to the cousin's statement." The information *The Courier* obtained from the Case Report states, "Huckabay told Robison she left the room but that she went back about 30 minutes later and she observed Ryan Whiteside (S-2) fingering Roper's vagina and that Kevin Jones (S-3) was in the room watching. Huckabay told Robison she was kicked out of the room again." Robison's statement in the Case Report provides, "[Huckabay] left the room went and talked went back to check on [Roper] this time Ryan was fingering her. She asked if they were just taking turns and he told her to leave." Again, the statements in the

article were substantially accurate reports of the contents of the documents Paxton Media obtained from the Russellville Police Department.

Whiteside objects to the statement "When Huckabay approached the bedroom a third time, she allegedly found the door locked, and according to the police report, text-messaged Jones, who was in the bedroom with the victim, Whiteside, and Simmons." Whiteside complains that this information appears in Robison's statement, rather than in the "blotter." Regardless where the statement appears, however, it is an undisputed fact, admitted by Whiteside, that Whiteside locked his bedroom door and that he and Jones stayed in the room while Simmons and Roper had sexual intercourse. Given this admitted fact, the source of the information (*i.e.*, Robison's statement or the blotter or some other part of the Case Report) has no relevance at all. A truthful statement cannot furnish the basis of a defamation claim in Arkansas. *Faulkner v. Arkansas Children's Hosp.*, 69 S.W.3d 393, 402 (Ark. 2002) (identifying "the statement's falsity" as an element of a defamation claim). At a minimum, the article remains substantially accurate despite a slight error in detail in attributing one piece of admittedly truthful information to the "police report" instead of more specifically to Robison's statement.

In regard to the second article, Whiteside argues that Paxton Media cannot benefit from the fair-report privilege because, in that article, *The Courier* did not include the following sentence from Gibbons's January 12 letter: "It should be noted that there is no evidence at all that Ryan Whiteside or Kevin Jones, both of whom

were also mentioned in the initial incident report, had any sexual contact with the complainant at any time during the 28th and 29th of December." The second article, however, was a substantially accurate report of Gibbons's letter and Rhoads's Investigative Summary. The headline above the article read, "No charges filed in alleged rape." The first part of the subheadline stated, "Prosecutor cites lack of evidence." The article itself reported that Gibbons "decided Friday night not to file charges in connection with an alleged rape during a Dec. 28, 2006 party at the home of Ryan Whiteside." The article relayed that Gibbons found that the case was not strong enough to prove the rape allegation given the State Police's interview of Huckabay and text messages—not e-mail messages, as Whiteside says in his petition—from the alleged victim to Simmons on December 29. The article also quoted Gibbons as saying, "There was a lack of evidence for prosecution." Whiteside's distinction between saying that a prosecutor filed no charges due to lack of evidence and saying that a prosecutor filed no charges due to a total absence of evidence is too thin to support an argument that the article was not substantially accurate.

Whiteside also argued that the fair-report privilege does not protect the second article because "the newspaper knew that the alleged source of the hearsay allegations in the witness statement denied making the allegations and had told the police that the statements were not true, yet the newspaper reported them again by way of background, thereby constituting actual malice and excessive publication." Whiteside's reference to the concepts of "actual malice" and "excessive publication" has no bearing on the Supreme Court of

Arkansas's application of the fair-report privilege in Arkansas. *See Jones*, 463 S.W.2d at 94-95. The fair-report privilege protects Paxton Media's articles because they were fair abridgements, or substantially accurate reports, of the contents of police documents. *E.g.*, *Butler*, 49 S.W.3d at 120. If the first publication has the protection of the fair-report privilege (and it does, as explained above), then the second publication of the same information has the protection of the fair-report privilege. *Jones*, 463 S.W.2d at 96. Further, in the second article, *The Courier* wrote, "Huckabay told investigators Jan. 4 she 'didn't feel that [the accuser] was being made to do things she did not want to do,' according to the report. Huckabay also denied telling the accuser's cousin she saw anyone giving the accuser drugs, or that she saw Whiteside having sexual contact with the accuser, according to the report." The article gave a substantially accurate rendition of official government information, including the reports that Huckabay denied the statements Robison attributed to her about Whiteside.

CONCLUSION

The petition for a writ of certiorari is totally meritless. It raises no important issue of federal law. It identifies no decision of this Court, a federal court of appeals, or another state court of last resort that conflicts with the decision below. And it challenges no more than the application of correctly stated rules of law to the peculiar facts of this particular case.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

JOHN E. TULL III
E. B. CHILES IV*
KRISTINE G. BAKER
QUATTLEBAUM, GROOMS,
TULL & BURROW PLLC
111 Center Street, Suite 1900
Little Rock, Arkansas 72201
(501) 379-1700

Attorneys for Respondents

* *Counsel of Record*